

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES A. MARCIARELLI and U.S. POSTAL SERVICE,
BARRINGTON POST OFFICE, Barrington, R.I.

*Docket No. 97-2071; Submitted on the Record;
Issued April 15, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$827.02 because appellant received compensation based on an incorrect pay rate for the period December 4, 1995 through November 29, 1996; and (2) whether the Office properly denied waiver of recovery of the overpayment.

On August 8, 1994 appellant, then a letter carrier, filed a traumatic injury claim (Form CA-1), assigned case number A10-331494 alleging that on that date he twisted his left knee while exiting a truck. The Office accepted appellant's claim for left knee strain and aggravation of osteoarthritis of the left hip. By letter dated April 4, 1997, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$827.02 because appellant received compensation based on an incorrect pay rate of \$684.70 for the period December 4, 1995 through November 29, 1996. The Office found that the correct pay rate was \$646.29. The Office further found that appellant was without fault in the creation of the overpayment. By decision dated May 7, 1997, the Office finalized its overpayment decision and finding of no fault. In addition, the Office found that appellant was capable of repaying the debt in full.

The Board has duly reviewed the case record in this appeal and finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$827.02 because appellant received compensation based on an incorrect pay rate for the period December 4, 1995 through November 29, 1996.

The record reveals that appellant received compensation during the period December 4, 1995 through November 29, 1996 at the pay rate of \$684.70 and totaling \$14,745.41. However, appellant should have received compensation based on the pay rate of \$646.20 and totaling \$13,918.39. Accordingly, an overpayment was created in the amount of \$827.02.

The Board further finds that the Office properly denied waiver of recovery of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹ These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."² Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).³ For waiver under this standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.⁴ An individual is deemed to need substantially all of his current income to

¹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

² 5 U.S.C. § 8129(b).

³ 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." See 20 C.F.R. §§ 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant must show both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the applicable resource base; see *George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of her current income to meet ordinary and necessary living expenses if her monthly income does not exceed monthly expenses by more than \$50.00; see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991).

⁴ *Forrest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayment Actions*, Chapter 9.200(6)(a) (September 1989).

meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁵

In the instant case, appellant completed a Form OWCP-20 overpayment recovery questionnaire. The questionnaire revealed that appellant has a dependent wife. The questionnaire also revealed monthly expenses of \$2,200.00,⁶ monthly income of \$1,800.00 and assets of \$5,500.00.⁷ Inasmuch as appellant's assets exceed the maximum allowable for an individual with a spouse, the Board finds that appellant is not entitled to waiver of recovery of the overpayment under the "defeat the purpose of the Act" standard.

Regarding the "against equity and good conscience" standard, section 10.323(b) provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.⁸

The evidence in this case does not establish that appellant would suffer undue hardship in repaying the overpayment in the amount of \$827.02. Further, the record does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the payment of compensation. To show detrimental reliance under section 10.323(b), appellant must show that he made a decision he otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss.⁹ Appellant did not allege any substantial reliance on the overpayment of compensation in this case, nor was detrimental reliance shown. Therefore, the Office properly determined that waiver of recovery of the overpayment was not warranted in appellant's case and that appellant was capable of making full repayment of the overpayment.

⁵ Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayment Actions*, Chapter 9.200.6(a)(1) (September 1989).

⁶ The questionnaire revealed monthly expenses of \$1,300.00 for rent or mortgage, \$500.00 for food, \$200.00 for utilities and \$200.00 for other expenses, thus, totaling \$2,200.00.

⁷ The questionnaire revealed that appellant has \$800.00 in a checking account and \$4,700.00 in a savings account totaling \$5,500.00.

⁸ 20 C.F.R. § 10.323(b).

⁹ *Forrest E. Brown, II, supra* note 4 at 285-86; Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayments Actions*, Chapter 9.200.6(b)(3) (September 1989).

The May 7, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
April 15, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member